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Memorandum

June 7, 1999

TO : Honorable Ernest J. Istook
Attention: Dr. William A. Duncan

FROM : Henry Cohen
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American Law Division

SUBJECT : Constitutionality of Blocking URLs Containing Obscenity and Child Pornography

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This memorandum is furnished in response to your question whether a draft bill titled the "Child Protection Act of 1999" would be constitutional if it were implemented by blocking URLs known to contain obscenity or child pornography. The draft bill would apply to any elementary or secondary school or public library that receives federal funds "for the acquisition or operation of any computer that is accessible to minors and that has access to the Internet." It would require such schools and libraries to "install software on [any such] computer that is determined [by a specified government official] to be adequately designed to prevent minors from obtaining access to any obscene information or child pornography using that computer," and to "ensure that such software is operational whenever that computer is used by minors, except that such software's operation may be temporarily interrupted to permit a minor to have access to information that is not obscene, is not child pornography, or is otherwise unprotected by the Constitution under the direct supervision of an adult designated by such school or library."

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The First Amendment does not apply to two types of pornography: obscenity and child pornography, as the Supreme Court has defined them.[1] It does, however, protect most pornography, with "pornography" being used to mean any erotic publication. The government may not, on the basis of its content, restrict pornography to which the First Amendment applies unless the restriction is necessary "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[2] It was on this ground that a federal district court struck down a Loudoun County, Virginia,

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[1] Miller v. California, 413 U.S. 15 (1973) (obscenity); New York v. Ferber, 458 U.S. 747 (1982) (child pornography).

[2] Sable Communications of California v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

public library policy that blocked access to pornography on all library computers, whether accessible to adults or children.[3]

The Loudoun County case involved a policy under which "all library computers would be equipped with site-blocking software to block all sites displaying: (a) child pornography and obscene material; and (b) material deemed harmful to juveniles. . . . To effectuate the . . . restriction, the library has purchased X-Stop, commercial blocking software manufactured by Log-On Data Corporation. While the method by which X-Stop chooses to block sites has been kept secret by its developers. . . . it is undisputed that it has blocked at least some sites that do not contain any material that is prohibited by the Policy."[4]

The court found "that the Policy is not narrowly tailored because less restrictive means are available to further defendant's interests . . . ."[5] One of these less restrictive means was that "filtering software could be installed on only some Internet terminals and minors could be limited to using those terminals. Alternately, the library could install filtering software that could be turned off when an adult is using the terminal. While we find that all of these alternatives are less restrictive than the Policy, we do not find that any of them would necessarily be constitutional if implemented. That question is not before us."[6]

X-Stop, as the court noted, blocks sites. If this means that it blocks URLs that are known to display child pornography and obscenity (and material deemed harmful to juveniles), as opposed to blocking particular material, on all sites, that constitutes child pornography or obscenity, then it would be the sort of software that you ask us to assume would be used to implement the draft bill. The draft bill, however, would be implemented by one of the "less restrictive means" to which the court referred — *i.e.*, by a less restrictive means than the Loudoun County library used. The draft bill would be implemented by a means that would permit the blocking software to be turned off when an adult is using the terminal. The court in the Loudoun County case did not find that this less restrictive means "would necessarily be constitutional if implemented," but it did not rule out the possibility.

Under the draft bill, whether computers were programmed to block URLs that are known to display child pornography and obscenity, or were programmed to block particular material, on all sites, that constitutes child pornography or obscenity, they would apparently, of necessity, block some material that constitutes neither child pornography nor obscenity. If, however, the former method of blocking were used — *i.e.*, the method of blocking URLs that you ask us to assume would be used — then there would be a Supreme Court precedent that would suggest that the draft bill would be constitutional even if it resulted in the blocking of some material that constitutes neither child pornography nor obscenity. This precedent is *Ginsberg v. New York*.[7]

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[3] Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 24 F. Supp.2d 552 (E.D. Va. 1998). On April 19, 1999, the defendant decided not to appeal this decision.

[4] *Id.* at 556.

[5] *Id.* at 567.

[6] *Id.*

[7] 390 U.S. 629 (1968).

In *Ginsberg*, the Court upheld a New York State "harmful to minors" statute, which is similar to such statutes in many states. This statute prohibited the sale to minors of material that —

> (i) predominantly appeals to the prurient . . . interest of minors, and (ii) is patently offensive to prevailing standards in the adult community . . . with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.[8]

The material that this statute prohibited being sold to minors were what the Court referred to as "'girlie' picture magazines."[9] It seems unlikely that such magazines were all literally "utterly without redeeming social importance for minors," as some of the magazines that the statute probably prohibited from being sold to minors probably had at least one article concerning a matter of at least slight social importance for minors. Yet this possible objection to the statute was not raised by the Court's opinion or even by the concurring or two dissenting opinions to *Ginsberg*.

Furthermore, the draft bill's prohibition would be less restrictive than the New York statute's, as the draft bill's prohibition would be limited to obscenity and child pornography. The Supreme Court has defined "obscenity" by the *Miller* test, which asks:

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[10]

The *Miller* test parallels the New York statute's description of material that is harmful to minors, but, in two respects, it covers less material than does the New York statute. First, to be obscene under the *Miller* test, material must be prurient and patently offensive as to the community as a whole, not merely as to minors. Second, to be obscene under the *Miller* test, material must, taken as a whole, lack serious value, but need not be *utterly* without redeeming social importance for minors.

As for child pornography, it did not exist as a legal concept (*i.e.*, as a category of speech not protected by the First Amendment) when *Ginsberg* was decided. The Supreme Court, however, has defined it so that it is immaterial whether it has serious value.[11] Therefore, the draft bill, in this respect, may be viewed as covering less material than laws against child pornography, as well as less material than laws against obscenity. As *Ginsberg* upheld a statute prohibiting the sale to minors of material that goes beyond obscenity and child pornography, and as the draft bill would be limited to those two categories, it appears that, based on the *Ginsberg* precedent, the draft bill, if implemented by blocking URLs known to contain obscenity or child pornography, would be constitutional.

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[8] *Id.* at 633.

[9] *Id.* at 634.

[10] Miller v. California, *supra* note 1, at 24.

[11] New York v. Ferber, *supra* note 1, at 763-764.